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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LEASE LIGHTS, INC., JACK R. SEAY, d/b/a SEAY ELECTRIC COMPANY, KNIGHT LIGHTS COMPANY, INC., and PROTECTIVE LIGHTING, INC.,
Petitioners

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does antitrust immunity under the Parker state-action doctrine extend to the involvement of a public utility in a separate non-utility business which the highest State Court has held to be outside the power of the State Commission to regulate?

2. Has the state exercised an active role of supervision pursuant to affirmatively-expressed and clearly-articulated legislative policy so as to confer state-action immunity from antitrust laws, when the State Commission regulates only the public utility which is otherwise under its jurisdiction and does not regulate other major competitors in the same non-utility business?

3. Is the unauthorized and unlawful tariff approval by a State Commission a shield from antitrust laws until such action is adjudged unlawful?

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PUBLIC SERVICE COMPANY OF OKLAHOMA
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lease Lights, Inc., Jack R. Seay, d/b/a Seay Electric Company, Knight Lights Company, Inc., and Protective Lighting, Inc., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals, reported at 849 F.2d 1330 is reproduced at App. A-1.

JURISDICTION

The judgment of the Court of Appeals was entered June 27, 1988. Petition for rehearing was denied by order dated August 16, 1988 (App. A-13). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Code, Title 15, § 2

United States Code, Title 15, § 15

United States Code, Title 28, § 1738

Oklahoma Constitution, Article IX, § 18

Oklahoma Constitution, Article IX, § 34

Oklahoma Statutes, Title 17, § 151

Oklahoma Statutes, Title 17, § 152

(App. B)

STATEMENT OF THE CASE

The questions presented are of importance in the administration of the antitrust laws throughout the nation insofar as they apply to public utilities and other regulated businesses which often penetrate competitive areas beyond the sphere of their monopolies. The decision of the Court of Appeals is in conflict with numerous decisions of this Court as pointed out herein. Federal jurisdiction in the District Court is based on 15 USC §2, 15, 22 and 28 USC §1337.

The decision of the Court of Appeals should be reviewed because it represents an unjustified enlargement of an exemption to the federal antitrust laws created by decisions of the U. S. Supreme Court. The U. S. Supreme Court always has been

recognized as the protector of the public policies embodied in the antitrust laws. If the doctrine of state-action immunity is to be expanded, it should be done by the U. S. Supreme Court and not by the circuit courts while disregarding clear and compelling decisions of this Court.

This case is a sequel to numerous decisions of the U.S. Supreme Court involving enforcement of Federal anti-trust laws regarding intrusions by public utilities and other state-regulated businesses into private competitive markets outside the realm of their regulated businesses. Recent principal decisions of the U.S. Supreme Court dealing with application of the doctrine of state-action immunity to such activities are: *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 49 L.Ed.2d 1141, 96 S.Ct. 3110 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 53 L.Ed.2d 810, 97 S.Ct. 2691 (1977); *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 55 L.Ed.2d 364, 98 S.Ct. 1123 (1978); *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 63 L.Ed.2d 233, 100 S.Ct. 937 (1980); *Southern Motor Carriers Rate Conf. v. U.S.*, 471 U.S. 48, 85 L.Ed.2d 36, 105 S.Ct. 1721 (1985); *324 Liquor Corp. dba Yorkshire Wine & Spirits v. Duffy*, 479 U.S. 335, 93 L.Ed.2d 667, 107 S.Ct. 720 (1987); *Patrick v. Burget*, 486 U.S. _____, 100 L.Ed.2d 83, 108 S.Ct. _____ No. 86-1145 (1988).

The Supreme Court, by these decisions, has given immunity from the antitrust laws to persons engaged in anticompetitive conduct pursuant to policy of a State in its sovereign capacity only if two criteria are satisfied: (1) A policy to replace competition with regulation in the affected market must be clearly articulated and affirmatively expressed by the State Legislature (2) The policy must be actively supervised by the State pursuant to such policy.

The highest court of the State of Oklahoma, in a decision between the same parties preceding trial of this cause, held that outdoor lighting was not a part of the electric utility business and that it was a separate business beyond the power of the Oklahoma Corporation Commission to regulate. *Public Service Company of Oklahoma v. Corporation Commission*, 688 P.2d 1274 (Okl. 1983) (Herein referred to as PSO case, Part VI, the only relevant portion of opinion is reproduced at App. C-1.)

The petitioners are entrepreneurs engaged in the business of leasing outdoor lights in Tulsa County, Oklahoma. PSO, an electric public utility, is in the same business. The utility entered the lighting business of its own volition and was not ordered or directed to do so by the State. PSO has filed tariffs with the Oklahoma Corporation Commission during part of the time it has been in the lighting business, and some of the tariffs have been approved by the Commission. In the early years of its involvement in the lighting business PSO did not file tariffs with the Commission. The earliest commercial and industrial outdoor lighting tariff for which PSO has produced a written order of approval as required by Commission rules is effective May 16, 1975. The order approving that tariff is a blanket order which does not mention or indicate consideration of outdoor lighting. The earliest Commission order that specifically mentions outdoor lighting is dated May 7, 1980. The part of the order approving outdoor lighting was reversed by the Oklahoma Supreme Court which held that such lighting was a separate business beyond the power of the Commission to regulate. Petitioners and Respondent were parties to that case.

PSO is the only Oklahoma utility which has competitors in the business of leasing outdoor lights. Petitioners and competitors other than the utility held approximately 70% of the

commercial and industrial lighting business in the area where PSO allowed them to compete from 1969 to 1975. However, the Commission has never in any way regulated petitioners or any competitors. Regulation by the Commission has been limited to acceptance and sometimes approval of the utility's tariffs even though other independent competitors have held a substantial share of the market.

The instant case was instituted by petitioners seeking damages under 15 U.S.C. §§ 15 and 22 based upon predatory and anti-competitive conduct on the part of respondent injuring the business of the petitioners and restraining commerce. A jury returned a verdict for the petitioners. Respondent did not file a motion for new trial but filed a motion for judgment N. O. V. which was denied by the District Court, and judgment was entered on the verdict. The Court of Appeals reversed the judgment of the District Court, holding that PSO is immune from the antitrust laws under the State-Action or "Parker" exemption.

REASONS FOR GRANTING THE WRIT

I.

Legislative expression and articulation of policy to replace competition with regulation.

Federal Courts are required to give preclusive effect to judgments of state courts[1]. The Oklahoma Supreme Court, in a case between the same parties entered a judgment which was introduced in evidence at the trial of this case, adjudicating that PSO's outdoor-lighting business was a separate venture and not

[1] 28 USC § 1738; *Migra v. Warren City School Dist. Bd. of Education* 465 U.S. 575, 79 L.Ed.2d 56, 104 S.Ct. 892 (1984).

a part of the electric-utility business and, as such, was beyond the regulatory jurisdiction of the Oklahoma Corporation Commission.

> "The argument revolves substantially around *jurisdiction* of Commission to even deal with PSO's investment in the lighting business . . . PSO case *supra* at p. 1280.
>
> "We hold that a business such as area outdoor lighting is a separate venture of PSO, is not used or useful to the ratepayers as a whole, and thus its investment may not be included in its general rate base. It is similar in nature to the selling of appliances (which are improper under 18 O.S. 1971, § 1.27) at p. 1281."

That judgment constitutes a collateral estoppel which is binding as to the lack of any constitutional or legislative power on the part of the Commission to regulate, and it conclusively adjudicated that there is no legislative policy of the State of Oklahoma in its sovereign capacity to replace competition with regulation in the outdoor-lighting industry. The same provisions of the Oklahoma Constitution (Art. IX, § 18 and § 34) and statutes (17 Okl. Stat. § 151-152) relied upon by the Court of Appeals were before the Oklahoma Supreme Court in the prior case. (See briefs of parties, App. D.) The Court of Appeals' view that the State Court's decision can be interpreted as being based upon insufficiency of evidence is incorrect, for the Commission requested and was denied remand for further evidence, (Comm. Resp. to briefs for rehearing pp. 5-6, and Order den. pet. for rehearing, App. D 8-10.) The Court of Appeals erred in failing to give preclusive effect to the prior judgment of the state court.

Even if the Court of Appeals is not required to give preclusive effect to the judgment of the state court it must

follow state law as declared by state courts[2], and it has erred in its failure to follow the law of the State as declared by the Oklahoma Supreme Court and has completely misconstrued the Oklahoma Constitution and the Oklahoma statutes contrary to their plain wording and contrary to the declaration of the highest State Court. In ignoring decisions of the Oklahoma Supreme Court and proceeding with its own analysis the Court of Appeals erred. This case is not presented to the United States Supreme Court to resolve an error of a Court of Appeals in interpreting matters of state law. These matters were clearly decided by the Oklahoma Supreme Court.

The Court of Appeals stated: " . . . The Oklahoma Constitution gives the Commission the power to regulate public utilities, which it defines as 'all gas, electric, heat, *light*, and power companies . . . ' Okla. Const. art. IX, § 34 (emphasis added) at p. 1333."

The Oklahoma Supreme Court has held in numerous cases that the Oklahoma Constitution granted to the Commission the power to regulate *only transportation and transmission companies* and not public utilities.[3]

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[2] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 82 LEd 1188, 58 S.Ct. 817 (1938).

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[3] " . . . Jurisdiction over gas utilities was not included in that conferred upon the commission by section 18, art. 9, Constitution, relating to transportation and transmission companies . . . But all the powers and duties specified in the Constitution as to transportation and transmission companies, and others in addition thereto, were conferred over gas and other public utilities by chapter 93, Sess. Laws 1913 (now 17 Okl.Stat. § 152)." *Okla. Natural Gas Co. v. State*, 188 P. 338, 340 (Okl. 1920); *Shawnee Gas & Elec. Co. v. Corp Comm. of Okla.*, 130 P. 127 (Okl. 1913); *Oklahoma Gas & Elec. Co. v. Wilson & Co.*, 288 P. 316 (Okl. 1930); *Guthrie Gas, etc., Co. v. Board of*

The interpretation of the Oklahoma Constitution and the Oklahoma statutes contrary to their plain wording and contrary to the prior construction of the same provisions by the Oklahoma Supreme Court are a crucial flaw in the reasoning of the Court of Appeals. The Court of Appeals quotes from *Oklahoma Constitution Article 9 § 34* what it contends is a definition of "public utilities"; however, the quoted definition clearly is a definition of "public service corporations" rather than "public utilities". The term "public service corporations" has no significance, inasmuch as neither the Constitution nor legislation grants any power over them to the Corporation Commission. That fact is clearly stated by the numerous decisions of the Oklahoma Supreme Court previously quoted and cited herein. It is equally clear from said decisions that the only authority of the Oklahoma Corporation Commission to regulate electric utilities (not public service corporations) is granted by the legislature by *17 Okl. Stat. § 152*. That authority is to regulate a public utility as defined by the same legislative Act: "The term 'public utility' as used in §§ 151 through 155 of this title shall be taken to mean [a corporation . . .] that now or hereafter may own, operate or manage any plant or equipment, . . . (c)for the *production, transmission, delivery or furnishing electric current* for light, heat or power." (emphasis added). *17 Okl. Stat. § 151*

It is clear that the electric utility business of the defendant which the Corporation Commission is empowered to regulate is

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Footnote 3 continued from previous page.

Education, 166 P. 128 (Okl. 1917); *City of Durant et al v. Consumers' Light & Power Co.*, 177 P. 361 (Okl. 1918); *Southern Oil Corp. v. Yale Natural Gas Co.*, 214 P. 135 (Okl. 1923); *Muskogee Gas & Electric Co. v. State*, 186 P. 730 (Ok 1920); *Merrill, 50 Years of Public Law In Oklahoma*, Vol. 10 Okl. L Rev. 375.

limited to: "*production, transmission, delivery, or furnishing electric current*". The purposes for which the electricity may be used does not, in any way, enlarge upon the statutory definition of an electric public utility. If the definition can be expanded to include the furnishing of lighting, then it likewise would include the furnishing of heat and power, a definition which would include all possible uses of electricity and which would authorize the utility to take over all segments of industry employing appliances which utilize electricity. This definition of an electric utility obviously was not intended, and such an interpretation would result in dire consequences disruptive to the entire enocomy as pointed out in the dissenting opinion of Corporation Commissioner Dawson quoted with approval by the Oklahoma Supreme Court in the PSO case, *supra* 1280-81.

Many other regulatory commissions have been held lacking jurisdiction to include in the rate base a utility's participation in a free-competition market where the utility dealt with appliances which consumed the utility's energy.[4]

In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) a California raisin producer challenged a state statute that authorized "programs for the marketing of agricultural commodities produced in the state, so as to restrict competition

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[4] *Re Intermountain Gas Co., Idaho, Order 11507*, 1974; *Re Southern California Gas Co.*, 35 P.U.R. 3d 300; *Re Montana-Dakota Utilities Co.*, 16 P.U.R. ed 130; *Re Central Arizona L&P Co.*, 6 P.U.R. (NS) 49; *Re Opinion of the Justices*, 23 P.U.R. (NS) 349; *Re Montana-Dakota Utilities Co.*, 78 P.U.R. (NS) 33; *Re Milwaukee G & L Co.*, 44 P.U.R. (NS) 194; *Re New Hampshire Gas & E Co.*, P.U.R. 1931 D, 225; *Commission v. Commonwealth Edison*, P.U.R. 1918 F. 109; *Claggett v. Eastern Shore G & E Co.*, P.U.R. 1920 C. 501; *Re Consolid. G.E.L. & P. Co.*, 14 Ann. Rep. M.P.S.C. 107 (Md); *Texas v. San Antonio P.S.C.*, P.U.R. 1932 B, 336; *Sunset Shingle Co. v. Northwest Electric & Water Works*, 203 P. 978 (Wash.).

among the growers and maintain prices in the distribution of their commodities to packers." The Supreme Court found that the program restricting the marketing of raisins in California "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." (at U.S. 250)

The Court held that the Sherman Act did not prohibit states from replacing competition with regulation pursuant to legislative dictation. This decision established the doctrine of state-action immunity. Numerous decisions subsequently have refined the doctrine.

In *Goldfarb v. Virginia State Bar* 421 U.S. 773, 44 L.Ed.2d 572, 95 S.Ct. 2004 (1975) the Court held that fee schedules were not compelled by the State Supreme Court *or state legislature* and that a state bar association enforcing them was not immune from antitrust laws even if its conduct was prompted by state action, since the bar association was not executing the mandate of the State[5].

In *Cantor v. Detroit Edison Co., supra* this Court held a Michigan utility which furnished free light bulbs to its electricity users could not claim state-action immunity even though the lamp exchange program was carried on under a tariff approved

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[5] "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. Here we need not inquire further into the state-action questions because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities . . . " at U.S. 790.

by the State Commission and could not be abandoned without Commission approval[6].

In *Bates v. State Bar of Arizona, supra* the State Supreme Court's rules prohibiting lawyer advertising were held to confer *"Parker"* immunity because the State Supreme Court wields the state's power over practice of law. Rules were clearly articulated by state policy, and the court closely supervises their enforcement by pointed reexamination.

In *Lafayette v. Louisiana Power & Light Co., supra* two Louisiana cities were alleged to have violated antitrust laws by certain conduct in the operation of electric utility systems. The cities claimed antitrust immunity based upon their status as political subdivisions of the State which would be entitled to state-action immunity. The Court held that conduct of cities was not exempt from application of the antitrust laws "when the State itself has not directed or authorized an anticompetitive practice . . . " (*supra* at U.S. 416)

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[6] "The distribution of electricity in Michigan is pervasively regulated by the Michigan Public Service Commission. A Michigan statute vests the Commission with 'complete power and jurisdiction to regulate all public utilities in the state . . . ' Respondent advises us that the heart of the Commission's function is to regulate the 'furnishing . . . [of] electricity for the production of light, heat or power . . .' "

"The distribution of electric light bulbs in Michigan is unregulated. The statute creating the Commission contains no direct reference to light bulbs. Nor, as far as we have been advised, does any other Michigan statute authorize the regulation of that business." (at U.S. 584)

" . . . Thus, Michigan's regulation of respondent's distribution of electricity poses no necessary conflict with a federal requirement that respondent's activities in competitive markets satisfy antitrust standards." (at U.S. 596)

"we conclude that neither Michigan's approval of the tariff filed by respondent, or the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program." (at U.S. 598)

In *California Liquor Dealers v. Midcal Aluminum, supra* the Court held that enforcement of a State wine-pricing plan should be enjoined, there being no immunity from antitrust laws even though the state legislature had clearly and forthrightly stated a policy to permit resale price maintenance, because there was not sufficient state supervision of the plan, thus the second requirement for "Parker immunity" was not met. The Court established a simple two-part test to determine whether state-action immunity applies:

> " . . . 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Supra* at U.S. 105.

In *324 Liquor Corp., dba Yorkshire Wine & Spirits v. Duffy* 479 U.S. 335, 93 L.Ed.2d 667, 107 S.Ct. 720 (1987) a New York statute which imposed a regime of liquor price maintenance was held invalid, not being within the state-action exemption to antitrust laws. The Court held that the pricing system, though clearly articulated and affirmatively expressed, lacks supervision and therefore failed to meet the second prong of the *Midcal* test.

It is clear that the state policy must be expressed and articulated by the state in its "sovereign capacity" and that state agencies or subdivisions, acting without legislative command, cannot grant immunity.[7]

In denying *Parker* immunity to a city acting under blanket delegation of home-rule authority by the state legislature, this court said: "But plainly the requirement of 'clear articulation

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[7] " . . . Acting alone, however, these agencies could not immunize private anticompetitive conduct." . . . Parker immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature.

and affirmative expression' is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive." *Community Communications Co. v. Boulder*, 455 U.S. 40, 55, 70 L.Ed.2d 810, 102 S.Ct. 835 (1982).

> "In determining whether antitrust law has been displaced, the starting point must be the statute under which the industry in question is regulated . . . (t)he provisions of utility initiated tariff filings do not furnish a predicate for a Parker v. Brown exmption from antitrust claims by competitors injured as a result of compliance with the tariffs." *Essential Comm. v. AT&T*, 610 F.2d 1114, 1117, (CA3d 1979)
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> "This inquiry becomes necessary when an act by a subordinate government agency is at stake for it is well settled that not everything it does is an act of the state as sovereign." *Feldman v. Gardner*, 661 F.2d 1295, 1305 (CA, DC 1981)
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> "Naturally the questions arises—what constitutes an articulation of the state in its sovereign capacity? Certainly enactments of the state in its sovereign capacity . . . On the other hand, state agencies or subdivisions of a State simply by reason of their status as such, apparently do not qualify as the state acting in sovereign." *First Am Title Co. v. S. D. Land Title Assn.*, 714 F.2d 1439, 1451 (C.A. 8d 1983).

Footnote 7 continued from previous page.

"In this case, therefore, the petitioners are entitled to Parker immunity only if collective ratemaking is clearly sanctioned by the legislatures of the four States in which the rate bureaus operate . . ." *Southern Motor Carriers Rate Conf. v. U.S., supra* at L.Ed.2d 49

"Goldfarb therefore made it clear that, for purposes of the Parker doctrine, not every act of a state agency is that of the State as sovereign." *Lafayette v. Louisiana Power & Light Co., supra* at U.S. 410

The provisions of the state constitution and state statutes relied upon by the Court of Appeals confer no power upon the Corporation Commission to regulate the outdoor-lighting industry (which the Oklahoma Supreme Court has held to be a separate non-utility business beyond the power of the Commission). The defendant can point to no clearly-articulated and affirmatively-expressed policy of the state legislature to replace competition in the lighting market with state regulation. Attempts by the commission to regulate a part of that market by unlawfully approving lighting tariffs of the utility simply because it is regulated in the electric utility business are nothing more than bureaucratic fiat. The unauthorized bogus regulatory acts of the commission do not furnish the required sovereign determination and declaration that competition is not the *summum bonum* in the lighting business.

II.

State Supervision of Program to replace competition.

The "active supervision" requirement stated in *Midcal* and other cases has been applied by this Court in numerous decisions to determine the availability of state-action immunity. In *Bates*, *supra*, this Court held that pointed reexamination by the policy maker was sufficient supervision to confer immunity. In *Midcal* the supervision was held to be insufficient to confer immunity because the state does not monitor market conditions or engage in any pointed reexamination of the program[8].

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[8] "The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As Parker teaches, 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . .' " *supra* at U.S. 106.

Immunity did not exist in *Duffy* because the State scheme of price regulation did not meet part 2 of the *Midcal* test. " . . . New York 'does not monitor market, conditions or engage in any "pointed reexamination" of the program' . . . The State has displaced competition among liquor retailers without substituting an adequate system of regulation. . . . " *supra* at U.S. 345

A claim of *"Parker"* immunity was rejected by this Court in a recent decision: " . . . The active supervision prong of the *Midcal* test requires that state officials *have and exercise power to review particular anticompetitive acts* of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget, supra* at L.Ed.2d 92.(emphasis added).

In *Cantor*, this Court in rejecting a state-action immunity claim, considered it significant that "Neither the Michigan Legislature nor the Commission, have ever made any specific investigation of the desirability of a lamp exchange program or of its possible effect upon competition in the lightbulb market." In *Bates* pointed reexamination by the policymaker was significant in the Court's finding of sufficient state supervision. In *Midcal* and *Duffy* the Court found there was not state supervision and, therefore, no immunity when "The State does not monitor market conditions or engage in any pointed reexamination of the program." (*Midcal* at U.S. 106; *Duffy* at U.S. 345).

In *Patrick* the Court held that state officials must "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." (L.Ed.2d at 92) Because this supervisory power

was missing, *Parker* immunity was not available to the defendants.

Neither the Oklahoma Legislature nor the Commission has ever made any investigation of the desirability of displacing competition in the lighting market. Neither the Commission nor any other state agency has ever monitored market conditions or engaged in a pointed reexamination of the particular anticompetitive conduct of the defendant and its possible effect upon the outdoor-lighting market and others, including the plaintiffs, who compete in the same market.

Testimony of the Commission chairman and its general counsel introduced by the respondent in support of its motion for summary judgment conclusively demonstrates the total lack of any consideration of the standards emphasized by the Court in the foregoing decisions[9].

Admittedly, there has been no state supervision over the plaintiffs and others who compete with the defendant in the lighting market. This is true even though those competitors, excluding defendant utility, commanded approximately 70% of the market from 1969 to 1974 and maintained a substantial,

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[9] "Q—Well, do you take into consideration the effect of your regulations on that competition by those electrical contractors? A—No, I don't—I don't know that that would be considered because we don't regulate those electrical contractors . . ." (Commissioner Privett, Def's Memo in Suppt of MSJ, Dkt 17, App. 4, p. 31.)

"Q—Are you aware that independent electrical contractors are in competition with PSO in the outdoor lighting business? A—Yes sir.

Q—And those contractors are unregulated, aren't they? A—That is correct.

Q—And they're not engaged in the public utility business, are they? A—In my opinion, they are not." (Gen. Counsel Swidensky, Def's Memo in Suppt of MSJ, Dkt 17, App. 3 p. 42)

though ever-declining, market share during all times pertinent to this suit. (See plaintiffs' exhibits 22, 24, App. E.) Even if there had been a legislatively expressed policy of the sovereign state to supplant competition in the outdoor-lighting business, it is not possible for the state to supervise particular anticompetitive acts of private parties when supervision ignores major or substantial segments of the market. It is quite apparent that the Commission neither recognizes nor seeks to implement any power given by the Legislature to regulate the outdoor-lighting business, but that the Commission approved tariffs submitted by PSO merely because the utility was otherwise under the Commission's regulatory jurisdiction. If the Commission meant to pointedly reexamine the program, supervise anticompetitive conduct, and monitor market conditions in the lighting business it would have to regulate all competitors, including plaintiffs and others. What the Commission does with other utilities in other parts of the state is irrelevant. PSO is the only utility which has competitors in the lighting business. There are no non-utility competitors such as plaintiffs outside PSO's service area.

III.

Reliance on purported "Regulation" until declared unlawful as a shield from antitrust laws.

The Court of Appeals held that the decision of the Oklahoma Supreme Court which deregulated PSO's lighting business did not deprive the utility of its immunity defense, it being entitled to rely on tariffs approved by the Commission before 1984 even though the Commission was determined to be acting beyond its jurisdiction and power.

This holding directly contravenes the law as laid down by this Court: " . . . a state does not give immunity to those who

violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . " *Parker, supra* at U.S. 351. This same axiom is quoted with approval by the Court in *Midcal supra* at U.S. 106. In *Cantor supra* at U.S. 600 this court stated:

> "Nor can the utility fairly claim that it was led to believe that its conduct was exempt from the federal antitrust laws. A claim of immunity or exemption is in the nature of an affirmative defense to conduct which is otherwise assumed to be unlawful. This Court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law.
>
> "In the Court's most recent consideration of this subject, it described the defendant's claim with pointed precision as 'this so-called state action exemption.' Goldfarb v. Virginia State Bar, 421 U.S. 773, 788, 44 L.Ed2d 572, 95 S.Ct. 2004. The Court then explained that the question whether the anticompetitive activity had been required by the State acting as sovereign was the 'threshold inquiry' in determining whether it was state action of the type the Sherman Act was not meant to proscribed. Certainly that careful use of language could not have been read as a guarantee that compliance with any state requirement would automatically confer federal antitrust immunity."

The Court of Appeals, completely disregarding the law as laid down by this Court, gives complete exoneration to a violator of the antitrust laws for reliance upon an unlawful order of a state agency even though the state legislature had expressed no policy to replace competition nor to authorize the agency even to act in the affected area of commerce. The standard enunciated by the Supreme Court would not afford such forgiveness to a violator acting under valid state compulsion.

Such a rule as that espoused by the Court of Appeals surely cannot be tolerated in the dual federal-state system of laws, for it would allow a simple way for any state agency or political subdivision to render nugatory the supremacy provisions of the United States Constitution. Any state agency or any political subdivision of a state could confer immunity from the antitrust laws by issuing orders and directives and by implementing schemes and plans which are totally unauthorized by any state as sovereign and which are completely beyond the jurisdiction and authority of such state agency or political subdivision.

The vice of the opinion of the Court of Appeals is that it will stand as a precedent for the assumption that state-action immunity exists in cases where the regulatory actions of a state agency have been tolerated only because never focused upon by the courts of the State.

PSO invaded the lighting business on its own initiative. Its executive vice-president testified that it was not required to do so. (testimony King Tr. 1103) He testified that "the (PSO) rate department decides what it wants to charge." (Tr. 1056). The Commission investigated PSO in 1967 and found it was furnishing service and charging rates without Commission approval (Tr 854-861). PSO did not have a tariff for commercial and industrial outdoor lighting approved by a Commission order (as required by Commission rules) before 1975. The order gave blanket approval of numerous tariffs and made no mention of lighting. PSO admittedly leased such lights as early as 1923 (Tr 1064). Defendant's exhibit 4 contains 5 outdoor-lighting tariffs that were not even filed with the Commission. Others, though filed, were not approved by commission orders. No order approving an outdoor-lighting tariff before 1975 has been produced. (See DX 5). PSO leased 400w lights long before

it claims to have had an approved tariff (Tr 684, 189, 193). The first Commission order that mentions outdoor lighting is dated May 7, 1980. That order was reversed by the State Supreme Court in the PSO case, *supra*.

PSO cannot fairly claim that it justifiably believed its conduct in the lighting business was immune from the antitrust laws. The utility entered the lighting busines voluntarily without compulsion or direction by the State. It did not comply with the law and Commission rules so as to utilize Commission-approved tariffs at all times when it leased lights in the unregulated competitive market. This Court's decision in *Cantor* in 1976 gave clear and strong warning to utilities that they must observe antitrust laws when they enter competitive markets outside the scope of their regulated monopoly. Respondent cannot be heard to contend that it was led to believe that its conduct was exempt from the antitrust laws.

CONCLUSION

The Court of Appeals disregarded the numerous decisions of the U. S. Supreme Court in ruling that the Respondent is immune. PSO's conduct in the competitive lighting market fails to satisfy either part of the *Midcal* test. (1) There is no clearly articulated and affirmatively expressed policy of the State Legislature to displace competition. (2) There is no active State supervision. A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals, 10th Circuit.

Very respectfully submitted,

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APPENDIX A

LEASE LIGHTS, INC.; Jack R. Seay, d/b/a Seay Electric Company; Knight Lights Company, Inc.; and Protective Lighting, Inc.

Plaintiffs-Appellant

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,

Defendant-Appellant

Oklahoma Corporation Commission, Amicus Curiae.

No. 86-1797

United States Court of Appeals, Tenth Circuit.

June 27, 1988

The Public Service Company of Oklahoma (PSO) appeals from the jury verdict that it monopolized a sector of the leased outdoor lighting market in Tulsa, Oklahoma. PSO argues its conduct was controlled and supervised by the Oklahoma Corporation Commission (the Commission) until 1985 and may not be the subject of an antitrust action under the state action doctrine. PSO further urges that plaintiffs fail to prove sufficient non-immune conduct to support the claim of attempted monopolization. We hold that the state action doctrine protects those actions by PSO which were actively supervised by the Commission. In addition, we believe plaintiffs have failed to present adequate evidence of non-immune behavior by PSO to show an attempt to illegally monopolize the market for leased outdoor lighting in Tulsa. We therefore reverse the judgment of the district court.

I.

PSO is a public utility engaged in the generation, transmission, and delivery of electricity in parts of eastern and southwestern Oklahoma.[1] PSO also sells and leases 175 and 400 watt outdoor lights in Tulsa, Oklahoma. The Commission, a state agency, supervises the rates charged by PSO for leasing outdoor lights to the public and for providing electricity to competing light services. In 1975, the Commission ordered PSO both to reduce the rates charged to the public for its outdoor lighting service and to restructure its rate system for providing electricity by replacing the flat annual fee with an outdoor metered rate. As a result, PSO reduced its leasing rates in Tulsa by about four percent (from $4.00 to $3.85 for 175 watt lights), while substantially increasing the rates charged to contractors for electricity used in their competing light services.

Four electrical contractors brought this action in 1977, alleging that this order was the economic equivalent of an "atomic bomb." They claimed PSO sought to drive them out of business in order to monopolize the outdoor lighting market in the Tulsa area. PSO unsuccessfully moved for summary judgment, asserting its challenged conduct was immune from antitrust attack under the state action doctrine. The district court held that the state action immunity doctrine was still developing and no consistent test had emerged. In 1981, the action proceeded to a two-week jury trial during which the court directed a verdict against the plaintiffs for failing to satisfy the jurisdictional requirement of a Sherman Act violation by showing PSO's activities had a substantial impact on interstate commerce. This court reversed, holding that plaintiffs had made a

[1] Electric power is also provided in Oklahoma by three other investor-owned utilities and by 31 rural electrical cooperatives.

prima facie showing of a sufficient nexus between PSO's actions and interstate commerce. *See Lease Lights v. Public Serv. Co. of Okla.*, 701 F.2d 794 (10th Cir.1983). In a second trial in 1984, the jury awarded plaintiffs trebled damages exceeding $2 million. The court added over $500,000 in attorney fees and costs. PSO appeals from this judgment.

II.

A.

PSO's main argument is that its rate changes should be immune from antitrust attack. As first conceived by the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the state action doctrine allowed state legislatures to formally command that certain areas of commerce be exempt from the provisions of the Sherman Act. The Court subsequently developed the requirement that state legislatures compel the immune behavior. In *Goldfarb v. Virginia State Bar Ass'n*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), for example, the Court struck down a minimum fee schedule enforced by the state bar, holding that there existed neither a state law nor a state supreme court decision requiring the establishment of a rigid price floor in the fees attorneys could charge their clients. Similarly, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), the Court decided that state regulation on Detroit Edison's distribution of electricity did not confer state action immunity on its anticompetitive actions in the market for the sale of light bulbs. State regulation alone, according to the Court, was insufficient to show that a party's anticompetitive conduct is being commanded by the state government. As in *Goldfarb*, the Court in *Cantor* required a state to compel, rather than merely prompt or allow, anticompetitive conduct for state action immunity to be conferred.

Plaintiffs now urge us to adhere to the compulsion requirement set forth in these decisions. They ignore, however, that the Supreme Court has explicitly softened the previously stringent requirements for state action immunity. In *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985), the United States challenged a joint ratemaking procedure used by three motor carrier rate bureaus, arguing that the procedure could not be immune under the state action doctrine because it was not compelled by the four states in which the bureaus operated. The Court refused to adhere to the compulsion requirement. While compulsion by the state is the best evidence of a state policy to displace competition, according to the Court, immunity is justified if a state merely *permits* the conduct to occur. This test is satisfied by showing 1) the challenged behavior is sanctioned by a clearly articulated and affirmatively expressed state policy, and 2) the state actively supervises the private anticompetitive conduct at issue. 471 U.S. at 57, 105 S.Ct. at 1726 (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980)). The first element of the test does not require legislation explicitly authorizing the challenged conduct, but only an indication by the state that it intends to displace competition with regulation in the particular area of commerce. *Id.* at 64. 105 S.Ct. at 1730.

The Court held the rate bureaus met these requirements. Both parties agreed that the regulatory agencies in the four states actively supervised the collective ratemaking activities. Furthermore, three of the four states had statutes permitting collective ratemaking by common carriers. The fourth state, Mississippi, gave the regulatory agency authority to regulate common carriers by granting it the power to prescribe "just and reasonable rates" for the intrastate transportation of general

commodities. This language, the Court states, expressed the legislature's intent that intrastate trucking rates be determined by a regulatory agency, rather than by the market. Therefore, plaintiffs' collective ratemaking in each of the four states was protected by state action immunity.

The test employed in *Southern Motor Carriers* to replace the compulsion requirement has received consistent recognition by the Court as the proper standard to determine the applicability of state action immunity.[2] Indeed, on every occasion that the Court has considered state action immunity during the past three years, it has invoked the *Southern Motor Carriers* test rather than the compulsion test. *See, e.g., 324 Liquor Corp. v. Duffy,* 479 U.S. 335, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987) (New York's liquor pricing system does not fall within state action exemption to antitrust laws because the statute, even though "clearly articulated and affirmatively expressed as state policy," does not provide for active supervision by the state). Recently, for example, the Court held that the state action doctrine did not protect Oregon physicians from antitrust liability for their activities on hospital peer-review committees because state officials did not have the power to review the findings of these committees, and therefore the "active supervision" prong of the *Southern Motor Carriers* test was not satisfied. *See Patrick v. Burget,*—U.S.—, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988).

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[2] While the Court first articulated the test in the *Midcal Aluminum* decision, it also approved the compulsion requirement in that case. Needless to say, after *Midcal Aluminum* the federal courts were in complete confusion regarding which test to adopt. In *Southern Motor Carriers,* the Court for the first time clearly rejected the compulsion requirement. *See* Comment, *Private Parties and State Action Immunity to the Sherman Anti-Trust Act After Southern Motor Carriers Rate Conference,* 24 Houston L.Rev. 311, 333 (1987).

We have dwelled on *Southern Motor Carriers* and its progeny because these decisions are dispositive of the instant case. First, we believe there exists a clearly articulated state policy to regulate the market for leased outdoor lights. The Oklahoma Constitution gives the Commission the power to regulate public utilities, which it defines as "all gas, electric, heat, *light,* and power companies . . . ." Okla. Const. art. IX, § 34 (emphasis added). Pursuant to this authority, the legislature has given the Commission general supervision over all public utilities that supply "the production, transmission, delivery, or furnishing of heat *or light* with gas [and the] . . . electric current for *light,* heat or power." *See* Okla.Stat.tit. 17, § 151 (1981) (emphasis added).

Within this domain, the Commission has the power to prescribe "rules, requirements and regulations, affecting [the utilities'] services, operation, and the management and conduct of their business." Okla. Stat. tit. 17, § 152. The Commission also establishes and enforces rates "as may be reasonable and just." Okla. Const. art. IX, § 18. The constitution states that the authority of the Commission to prescribe these rates is paramount; rates which are inconsistent with the Commission's rates "shall be unlawful and void." *Id.* To carry out this mandate, the Commission may exercise "full visitorial and inquisitorial power to examine . . . public utilities . . . ." Okla.Stat. tit. 17, § 152. Furthermore, the Commission must periodically conduct detailed rate investigations and continually oversee public utilities' compliance with rate schedules which include fuel adjustment clauses. Okla.Stat. tit. 17, §§ 252, 263. We hold that these constitutional and statutory provisions indicate a clear intent by the state to supplant the market for leased outdoor lighting with active regulation by the Commission.

We also believe the Commission has used this grant of authority to closely supervise the outdoor lighting services provided by public utilities, including PSO. The Commission has regulated the outdoor lighting market in Oklahoma for twenty years. It currently imposes a thorough set of guidelines upon the lighting services of thirty-three public utilities operating within Oklahoma. Moreover, the Commission until 1985 closely regulated the rates charged by PSO for its outdoor lighting services. From 1977 to 1985, PSO submitted monthly reports to the Commission of its compliance with the fuel adjustment clause in its outdoor lighting rates. When PSO applied to reduce its Tulsa lighting charge from $4.00 to $3.95 a month for a 175 watt light (while raising the cost of its service in rural areas), the Commission conducted three days of public hearings involving extensive testimony and over 100 exhibits. After considering the evidence, the Commission rejected PSO's request and chose instead to reduce PSO's rate to $3.85. Thus, the lower rate charged by PSO for its outdoor lighting service in Tulsa, which plaintiffs claim destroyed their business, was compelled by an independent decision of the Commission that PSO could not disobey.

B.

Plaintiffs emphasize that the Oklahoma Supreme Court overturned the Commission's outdoor lighting rates in December 1983, finding that PSO's lighting business "is not used or useful to the ratepayers as a whole, and thus its investment may not be included in its general rate base." *Public Serv. Co. of Okla. v. Oklahoma Corp. Comm'n*, 688 P.2d 1274, 1281 (Okla.1983) (*PSO*).[3] We hold that this decision did not alter PSO's responsibility to comply with rates mandated by the

[3] As a result of this decision, the Commission decontrolled the rates for PSO's outdoor lighting service in April 1985.

Commission before 1984. The constitutional invalidity of the attempted state regulation is not an appropriate basis for disregarding state action immunity. *E.g., Llewellyn v. Crothers,* 765 F.2d 769, 774 (9th Cir.1985). Rather, there should be a defense for those reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.4b, at 132 (Supp.1987). To rule otherwise would require regulated industries to seek judicial review of every order of a regulatory agency to ensure that compliance does not later subject them to antitrust liability.

In this case, neither the Commission nor PSO had any reason to anticipate that outdoor lighting rates could not be included in PSO's rate base. Until the 1984 decision, the Oklahoma Supreme Court had never overturned a decision by the Commission involving the outdoor lighting of a regulated utility. Indeed, the court affirmed the 1975 "atomic bomb" order challenged in the instant case in *Chickasha Cotton Oil Co. v. Oklahoma Corp. Comm'n,* 562 P.2d 507 (Okla.), *cert. denied,* 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 88 (1977). The court also stated one year before *PSO,* "[t]he duty of the Commission to supervise, regulate and control the charges and rates of public utilities is constitutionally mandated." *Cartwright v. Southwestern Bell Tel. Co.,* 662 P.2d 675, 679 (Okla.1983).[4]

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[4] Furthermore, the 1984 decision may reasonably be interpreted as only requiring evidence that outdoor lighting is useful to the ratepayers, rather than as a limit on the Commission's jurisdiction to regulate the outdoor lighting market. Based on this interpretation, the Commission reconfirmed in December 1985 that the outdoor lighting provided by PSO's neighboring utility, Oklahoma Gas and Electric Company, should continue to be regulated. The Commission distinguished the *PSO* case on the ground that Oklahoma Gas and Electric's outdoor security lighting earned a "higher

For these reasons, we conclude that PSO's rate changes meet the test for state action immunity set forth in *Southern Motor Carriers.* Indeed, PSO's case for immunity is even stronger than the arguments successfully espoused in *Southern Motor Carriers,* since in that case, regulatory agencies merely allowed the challenged collective ratemaking by trucking companies. Individual common carriers remained free to submit invidiual rate proposals to the Public Service Commissions. 471 U.S. at 52, 105 S.Ct. at 1724. In the instant case, however, the Commission compelled the challenged conduct by rejecting PSO's requested rates and establishing its own price after extensive, formal hearings were held. As mentioned, the Court held in *Southern Motor Carriers* that compulsion is the best evidence of a state policy to displace competition. 471 U.S. at 62, 105 S.Ct. at 1729. Therefore, we hold that PSO's actions pursuant to the Commission's rate orders are immune from antitrust attack under the state action doctrine.[5]

Footnote 4 continued from previous page.

than system average rate of return" and was not subsidized by the other service classes. *See In the Matter of the Application of Oklahoma Gas and Electric Company,* OCC Cause No. 29450, Order No. 290658, p.10 (Dec. 20, 1985). We note that the interpretation of the public utility laws by the expert agency charged with enforcement of these laws should be given persuasive weight. *E.g., Gambrel v. Kentucky Bd. of Dentistry,* 689 F.2d 612 (6th Cir.1982), *cert. denied,* 459 U.S. 1208, 103 S.Ct. 1198, 75 L.Ed.2d 441 (1983).

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[5] PSO also believes it is insulated from liability by the Noerr-Pennington doctrine, which precludes application of the Sherman Act to an entity's efforts to obtain favorable treatment from the government, even if its goals are anticompetitive. Given our holding on PSO's state action immunity claim, we need not address this issue.

III.

The remaining issue is whether plaintiffs proved sufficient non-immune conduct to support the verdict. To prove attempted monopolization, plaintiffs must show: 1) a relevant market in which the alleged attempt occurred; 2) a dangerous probability of success in monopolizing the relevant market; 3) a specific intent to monopolize; and 4) conduct in furtherance of such an attempt. *Shoppin' Bag of Pueblo v. Dillon Cos.*, 783 F.2d 159, 161 (10th Cir.1986). Once immunity is recognized, PSO argues, it should be shielded from all complaints regarding the rate changes resulting from the 1975 order and from any other conduct which was mandated by the Commission. PSO believes that once the immune conduct is extirpated from plaintiffs' prima facie case, nothing remains of plaintiffs' contentions from which a reasonable jury could find predatory conduct satisfying the latter three elements of attempted monopolization.

We agree. Plaintiffs complain of a series of rate changes by PSO for its outdoor lighting service from 1973 to 1983, including the 1975 "atomic bomb" rate order. Yet each of these rate orders are immune under the state action doctrine because the Commission consistently established and supervised the rates charged by PSO during this period.

Several of plaintiffs' remaining allegations also concern conduct that is immune under the state action doctrine. For example, plaintiffs argue that PSO has an unfair advantage because, unlike private contractors, it is authorized by state and local authorities to install lighting without a state or municipal license. However, PSO did not cause these regulations to be adopted and is immune from attack based on the licensing requirements of state and local law, since these regulations are clearly articulated and actively supervised by the government.

For the same reason, plaintiffs' complaint that PSO refused to allow them to attach their lights to PSO's poles without a permit is untenable. Franchise agreements require plaintiffs to have a municipal permit before using PSO's poles; they expressly declare that PSO is "authorized to allow others *having a permitted right* granted by the City of Tulsa to attach facilities to its poles and structures." (Emphasis added.) Again, there is no evidence that these regulations are a sham or that city franchise agreements should not be immune from attack under the antitrust laws. *See Rural Elec. Co. v. Cheyenne Light, Fuel & Power Co.*, 762 F.2d 847 (10th Cir.1985) (requirements in city franchise agreement are immune from challenge under the state action doctrine).

Plaintiffs' final claim is that PSO unreasonably delayed hooking up their lights. While this alleged behavior is not immune under the state action doctrine, we believe plaintiffs have failed to show the delay resulted from a policy of discrimination. The only testimony on this issue was from a customer of plaintiffs who attributed the delay in the hookup of his light to the need to install an intermediate pole to bridge the distance between the existing electrical service and his light. Furthermore, PSO only had three work crews to serve 71,000 customers, and hooking up new commercial installations was a lower priority than restoring interrupted service or servicing new residential customers. We believe, therefore, there is no evidence that hookups for PSO's outdoor lighting customers received priority over hookups for other outdoor lighting installations. We hold that plaintiffs have failed to show either a specific intent to monopolize or nonimmune conduct in fur-

therance of the attempted monopolization.[6] Accordingly, the district court's judgment is REVERSED.

[6] Because of our holding, we need not address whether plaintiffs satisfied the first two elements of attempted monopolization. We note, though, that to satisfy the second element, plaintiffs must show there existed a dangerous probability of PSO succeeding in monopolizing the relevant market by proving it had the ability to control prices and exclude competition. *E.g., Shoppin' Bag of Pueblo,* 783 F.2d at 164. This would have been a very difficult task, given the fact that the Commission dictated to *PSO* both the price it could charge for leasing outdoor lights and the electricity rates it could levy on competing contractors. *Cf. Bright v. Moss Ambulance Serv.,* 824 F.2d 819, 824 (10th Cir.1987) (activity which is protected by state action immunity may not be the basis for allegations of improper market power).

No. 86-1797

LEASELIGHTS, INC.; JACK R. SEAY, d/b/a Seay Electric Company; KNIGHT LIGHTS COMPANY, INC.; and PROTECTIVE LIGHTING, INC.

Plaintiffs-Appellees

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation

Defendant-Appellant

OKLAHOMA CORPORATION COMMISSION

Amicus Curie

August 16, 1988

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judge Stephanie K. Seymour did not participate in consideration of the petition.

S/S Robert L. Hoecker

ROBERT L. HOECKER, Clerk

APPENDIX B

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Code, Title 15

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousands dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

United States Code, Title 28 § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same fall faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Constitution of the State of Oklahoma, Art. 9, § 18. Powers and duties—Notice before taking action—Process for witnesses—Authority of Legislature—Municipal powers

The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent

with those prescribed by the Commission, within the scope of its authority, shall be unlawful and void. The Commission shall also have the right, at all times, to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements, under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules, and regulations as may be necessary to prevent unjust or unreasonable discrimination and extortion by any transportation or transmission company in favor of, or against any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation, transmission, or otherwise, in connection with the public duties of such company. Before the Commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation, or requirement, shall first be given, by the Commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before said Commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or re-

quirement shall first be published in substance, not less than once a week, for four consecutive weeks, in one or more of the newspapers of general circulation published in the county in which the Capitol of this State may be located, together with the notice of the time and place, when and where the Commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation, or requirement; and every such general order, rule, regulation, or requirement, made by the Commission, shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also, so long as it remains in force, be published in each subsequent annual report of the Commission. The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the Legislature to legislate thereon by general laws: Provided, However, That nothing in this section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or country to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town, or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the Commission, as far as possible, to effect, by meditation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons or employees.

Constitution of the State of Oklahoma, Art. 9, § 34. Definitions—Avoidance of conflicts with U. S. Constitution

As used in this Article, the term "transportation company" shall include any company, corporation, trustee, receiver or any other person owning, leasing or operating for hire a railroad, street railway, canal, steamboat line, and also any freight car company, car corporation, or company, trustee or persons in any way engaged in such business as a common carrier over a route acquired in whole or in part under the right of eminent domain, or under any grant from the Government of the United States; the term "rate" shall be construed to mean rate of charge for any service rendered, or to be rendered; the terms "rate," "charge" and "regulation" shall include joint rates, joint charges and joint regulations, respectively; the term "transmission company" shall include any company, receiver or other person owning, leasing or operating for hire any telegraph or telephone line; the term "freight" shall be construed to mean any property transported or received for transportation by any transportation company. The term "public service corporation" shall include all transportation and transmission companies, all gas, electric, heat, light and power companies, and all persons, firms, corporations, receivers or trustees engaged in said businesses, and all persons, firms, corporations, receivers or trustees authorized to exercise the right of eminent domain or having a franchise to use or occupy any right of way, street, alley or public highway, whether along, over or under the same, in a manner not permitted to the general public, and all persons, firms, corporations, receivers and trustees engaged in any business which is a public utility or a public service corporation, at the present time or which may hereafter be declared to be a public utility or a public service corporation. The term "person" as used in this Article shall in-

clude individuals, partnerships, and corporations in the singular as well as plural number; the term "bond" shall mean all certificates or written evidence of indebtedness issued by any corporation and secured by mortgage or trust deed. The term "frank" shall mean any writing or token issued by or under authority of a transmission company, entitling the holder to any service from such company free of charge.

The provisions of this Article shall always be so restricted in their application as not to conflict with any of the provisions of the Constitution of the United States, and as if the necessary limitations upon their interpretation had been herein expressed in each case.

Amended by Laws 1941, p. 546, § 5.

Oklahoma Statutes, Title 17, § 151. Public utility defined —Exemption of nonprofit water and sewer corporations— Washington County—Authority of certain beneficiaries to condemn property

The term "public utility" as used in Sections 151 through 155 of this title, shall be taken to mean and include every corporation, association, company, individuals, their trustees, lessees, or receivers, successors or assigns, except as hereinafter provided, and except cities, towns, or other bodies politic, that now or hereafter may own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public.

(a) For the conveyance of gas by pipeline.

(b) For the production, transmission, delivery or furnishing of heat or light with gas.

(c) For the production, transmission, delivery or furnishing electric current for light, heat or power.

(d) For the transportation, delivery or furnishing of water for domestic purposes or for power. Provided further that a corporation organized and existing not for profit pursuant to Title 18 of the Oklahoma Statutes, §§ 851-863, but for the purpose of developing and providing rural water supply and sewage disposal facilities to serve rural residents shall not be declared a public utility under this act.[1] and shall be exempt in any and all respects from the jurisdiction and control of the Corporation Commission of this state.

The term "Commission" shall be taken to mean Corporation Commission of Oklahoma.

* * *

Laws 1913, c. 93, p. 150, § 1. Laws 1929, c. 353, p. 487, § 1; Laws 1971, c. 26, § 1; Laws 1971, c. 322, § 1, eff. June 24, 1971.

Oklahoma Statutes, Title 17 § 152. Commission's jurisdiction over public utilities

The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the business thereof, and the method in which same is conducted. It shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus,

[1] Section 151 et seq. of this title.

and other property owned, leased, controlled or operated, the value of same, the management, conduct, operation, practices and services; not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act,[2] and with the Constitution and laws of this state, and with the orders of the Commission.

Laws 1913, c. 93, p. 150, § 2.

[2] Section 151 et. seq. of this title.

APPENDIX C

PUBLIC SERVICE COMPANY OF OKLAHOMA
Appellant

v.

OKLAHOMA CORPORATION COMMISSION
Appellee

v.

The COALIATION FOR FAIR UTILITY RATES, INC., and Neighbor for Neighbor, Inc.
Cross-Appellants

v.

NATIONAL ELECTRIC CONTRACTORS ASSOCIATION, INC., Eastern Oklahoma Chapter, and Lease Lights, Inc., et al.
Counter-Appellants

Nos. 55320, 55346 and 55354.

Supreme Court of Oklahoma

December 27, 1983.

As Corrected Oct. 1, 1984.

Rehearings Denied Oct. 2, 1984.

DOOLIN, Justice:

Public Service Company (PSO), a Tulsa-based public utility, applied to the Corporation Commission for a 129 million rate increase. Following hearings at which several parties intervened, the Commission issued order No. 168923 from which PSO and the intervenors appeal.

* * *

VI

[1280] We are next asked to address Commission's inclusion into the rate base of PSO's investment in sodium and mercury vapor outdoor lighting. Evidence indicates PSO is in the business of furnishing illumination to commercial and industrial customers for a flat monthly fee. It provides and installs the poles, lamps, wires, controls, electricity and maintenance. Cross-appellants Lease Lights and others provide the identical service, and they appeal from the decision by Commission to include PSO's investment in said lights in PSO's rate base, thus guaranteeing it a rate of return on the business. The issue is not whether PSO has the right to carry on such a business; that is conceded by the opponents. The issue is whether PSO's investments in that business may be included in its rate base for all the ratepayers to bear. We answer in the negative.

The argument revolves substantially around *jurisdiction* of Commission to even deal with PSO's investment in the lighting business.

Lease Lights, a direct competitor of PSO's lighting business, says Commission should disallow expenditures for ratemaking purposes "unless the utility establishes such expenditure is demonstrated to be beneficial to *all* consumers." *State v. Oklahoma Gas & Electric,* 536 P.2d 887 (Okl.1975). (Emphasis added). It said PSO offered no evidence to justify including the investment in the rate base, which was its legal burden of proof.

National Electrical Contractors Association, Inc. (NECA), a counter-appellant, contends PSO is authorized to include in its rate base only equipment and plants used for the production, transmisssion, delivery and furnishing of electric power, citing 17 O.S. 1981, § 151, the statutory definition of a "public

utility." It argues that a public utility's rate base should include only those items which are used and useful to the utility's *public* service, not its *private* business. Its brief quotes from part of the dissent filed by Commissioner Bill Dawson:

> "It seems to this Commissioner that it is only unlawful but inequitable and unjust for a public utility to impose upon the general ratepayers the cost of outdoor-lighting which is utilized by a ratively (sic) small percentage of the customers (mostly commercial customers) who want the service, when a vast majority of the ratepayers have no desire for the service. The same outdoor-lighting service, at lease for commercial and industrial users, appears to be available through private contractors on a competitive basis without the imposition of unjust cost upon the general ratepayers.
>
> If a public utility can provide appliances to furnish illumination or lighting and include the investment and operation of such installations in its rate base, it could provide all appliances merely because they are operated by electricity. It could provide and include in its rate base all heating and air-conditioning systems, both residential and commercial. It could install, provide and include in its rate base all building elevators and all manner of electric motors and electrically-powered equipment. The natural result of such reasoning would be that a water utility could install and include in its rate base a bathtub in every residence, merely because it is supplied by water which the utility is authorized to furnish under its rate structure."

Finally NECA argues, as do the other intervenors, that the decision by the Commission to include outlighting expenses in PSO's rate base is not supported by substantial evidence. PSO answers that intervenors did not question the inclusion during the hearing, and only brought it to Commission's attention via

brief after the close of the hearing. It argues that absent notice it should not be required to account for every item to be included in the rate base. See *Central Maine Power Co. v. Maine Public Utilities Commission,* 405 A.2d 153 (Me.1979) which involved land held for future use and investment in joint corporate projects accounts. In fact, PSO admits "there is thus almost no evidentiary record on the subject" because it was not challenged before the Commission.

PSO argues that its area lighting service is as much a "public service" as its conservation and research programs and expenses for its general offices and home energy audits. It fails to note, however, that all the later categories do in fact serve the public as a whole, while its area lighting program serves only a very small proportion of the public. In other words, PSO would have *all* its ratepayers pay for a service utilitzed by a very few ratepayers.

Parties note Commission may exclude unnecessary items of cost. As example, the Commission may exclude certain promotional expenses if they are excessive, unwarranted, unreasonable, or incurred in bad faith." See *State v. Oklahoma Gas & Electric Co., supra.* Both parties note the case of *Virginia Electric Power Co. v. State Corporation Commission,* 219 Va. 894, 252 S.E.2d 333 (1979), in which the Commission excluded investment in outdoor area lighting from the company's rate base as "not devoted to the use and accommodation of the public," and such decision was upheld by the Virginia Court. The Virginia Court said the Commission had the authority to determine the public duties of the Company.

We hold that a business such as area outdoor lighting is a separate venture of PSO, is not used or useful to the ratepayers as a whole, and thus its investment may not be included in its

general rate base. It is similar in nature to the selling of appliances (which are improper under 18 O.S. 1971, § 1.27). See *State v. Oklahoma Gas & Electric*, supra.

* * *

AFFIRMED IN PART, REVERSED IN PART, CAUSE REMANDED TO ENTER ORDER CONSISTENT WITH THE VIEWS EXPRESSED HEREIN, INCLUDING CONSIDERATION OF SUBSTANCE ERROR AS TO CALCULATION, IF ANY, AS DISCUSSED IN PART IV HEREOF.

SIMMS, V.C.J., HARGRAVE, J., and ROBINSON, S.J., concur.

BARNES, C.J., and LAVENDER, J., concur in Parts I, II, III, IV, V and VII and dissent from Part VI.

HODGES, J., concurs in all parts except dissents to Part V.

OPALA, J., concurring in Parts I, III, IV, VII; dissents from Parts II, V, VI.

APPENDIX D

No. 55,320

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA
Appellant

v.

THE STATE OF OKLAHOMA
Appellee

v.

The COALIATION FOR FAIR UTILITY RATES, INC., AND NEIGHBOR FOR NEIGHBOR, INC.
Cross-Appellants

v.

NATIONAL ELECTRIC CONTRACTORS ASSOCIATION, INC., EASTERN OKLAHOMA CHAPTER, AND LEASE LIGHTS, INC.
Counter-Appellants

REPLY BRIEF

Appeal From
The Oklahoma Corporation Commission

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* * *

PSO and the Commission argue that Article IX, Section 34, which defines "public service corporations" to include "light" companies, places outdoor lighting within the Commission's rate making power. This argument admits the error of their previous contentions that 17 O.S. 1971, § 151, because it is definitional, does not restrict PSO's rate base.

Article IX does not address the Commission's jurisdiction over "public utilities", such as PSO. The Constitution vests Commission jurisdiction only as to transmission and transportation companies. *Shawnee Gas & Electric Co. v. Corporation Commission of Oklahoma,* 35 Okla. 454, 130 P. 127, 129 (1913). The framers of the Constitution left the matter of "public utilities" to the Legislature, which in turn enacted 17 O.S. 1971, § 151, et seq. These sections—not the Constitution —govern the Commission's power to set PSO's rates.

PSO's rate base is restricted by 17 O.S. 1971, § 151, then, or by nothing at all. If by nothing, PSO is free to engage in absolutely any activity, and be guaranteed a fair rate of return thereon. Indeed, if Section 151 does not restrict PSO's rate base, then rate base items need not be even useful to the public, because § 151 is the only provision governing public utilities which contains such a requirement. The only possible conclusion is that 17 O.S. 1971, § 151 does restrict PSO's rate base, i.e., that PSO's rate base may include only such activities as are used to generate or distribute electric current.

RESPECTFULLY SUBMITTED,
NICHOLS & WOLFE, INC.

S/S Brian Huckabee

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FILED
SUPREME COURT
STATE OF OKLAHOMA
DEC 16 1981
Ross I. Lillard, Jr.
CLERK

NO. 55,320

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA
Appellant

v.

THE STATE OF OKLAHOMA
Appellee

v.

The COALIATION FOR FAIR UTILITY RATES, INC., and Neighbor for Neighbor, Inc.
Cross-Appellants

v.

NATIONAL ELECTRIC CONTRACTORS ASSOCIATION, INC., EASTERN OKLAHOMA CHAPTER, and LEASE LIGHTS, INC.
Counter-Appellants

ANSWER BRIEF OF APPELLEE OKLAHOMA CORPORATION COMMISSION

* * *

Other provisions in the Constitution and statutes of Oklahoma indicate that electric utilities are not solely restricted to the furnishing of electric current. In fact, electric utilities are referred to at several points as "light and power companies." Perhaps the most important of these is Article IX, § 34, which provides in part:

> The term "public service corporation" shall include all transportation and transmission companies, all gas, electric, heat, light and power companies, and all persons, firms, corporation, receivers or trustees engaged in said business . . .

Article IX, § 18 of the Oklahoma Constitution, places public service corporations under the Commission's jurisdiction. Thus the Commission has jurisdiction over PSO both as a company which furnishes electric current, and as a company which furnishes light.

Respectfully submitted,

S/S Eddie M. Pope

EDDIE M. POPE
Appellate Counsel
Oklahoma Corporation Commission

NO. 55,320

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA
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THE COALIATION FOR FAIR UTILITY RATES, INC., and NEIGHBOR FOR NEIGHBOR, INC.
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v.

NATIONAL ELECTRIC CONTRACTORS ASSOCIATION, INC., EASTERN OKLAHOMA CHAPTER, and LEASE LIGHTS, INC.
Counter-Appellants

APPELLANT'S REPLY BRIEF

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* * *

As such, *all* of its activities related to that business are subject to Commission jurisdiction and supervision. This basic premise is clearly set forth in Article IX, § of the Oklahoma Constitution, which reads, in pertinent part:

> "The Commission shall have the power and authority and be charged with the duty of supervising, regula-

ting and controlling all transportation and transmission companies doing business in this State, *in all matters relating to the performance of their public duties and their charges therefor*, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end, the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, *and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just*, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend." (Emphasis added.)

* * *

Respectfully submitted,

DOERNER, STUART,
SAUNDERS, DANIEL &
ANDERSON

S/S W. H. Hinkle

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FILED
SUPREME COURT
STATE OF OKLAHOMA
FEB 6 1984
Ross N. Lillard, Jr.
CLERK

No. 55,320

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA
Appellant

v.

THE STATE OF OKLAHOMA
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v.

THE COALIATION FOR FAIR UTILITY RATES, INC., and NEIGHBOR FOR NEIGHBOR, INC.
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v.

NATIONAL ELECTRIC CONTRACTORS ASSOCIATION, INC., EASTERN OKLAHOMA CHAPTER, and LEASE LIGHTS, INC.
Counter-Appellants

RESPONSE TO BRIEFS FOR REHEARING

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* * *

The third concern of the Commission is the factual underpinning of the Court's order. The Commission in its initial brief viewed this question as one of law regarding Commission jurisdiction. Having read the decision of the Court and the submissions of other parties, the Commission believs it would be useful to the Court for the Commission to have an opportunity to build a better factual basis as a foundation for a Commission and, on possible review, Court determination as to the public interest.

* * *

CONCLUSION

The Commission respectfully recommends that this Court deny PSO's Petition for Rehearing with regard to Northeastner No. 3, but grant rehearing and remand the case on the outdoor lighting issue.

Respectfully submitted,

S/S J. Bailey
James H. Bailey
General Counsel

S/S Lindil C. Fowler, Jr.
Lindil C. Fowler, Jr.
Deputy General Counsel—
Public Utilities

FILED
SUPREME COURT
STATE OF OKLAHOMA
OCT 2 1984
JAMES W. PATTERSON
CLERK

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

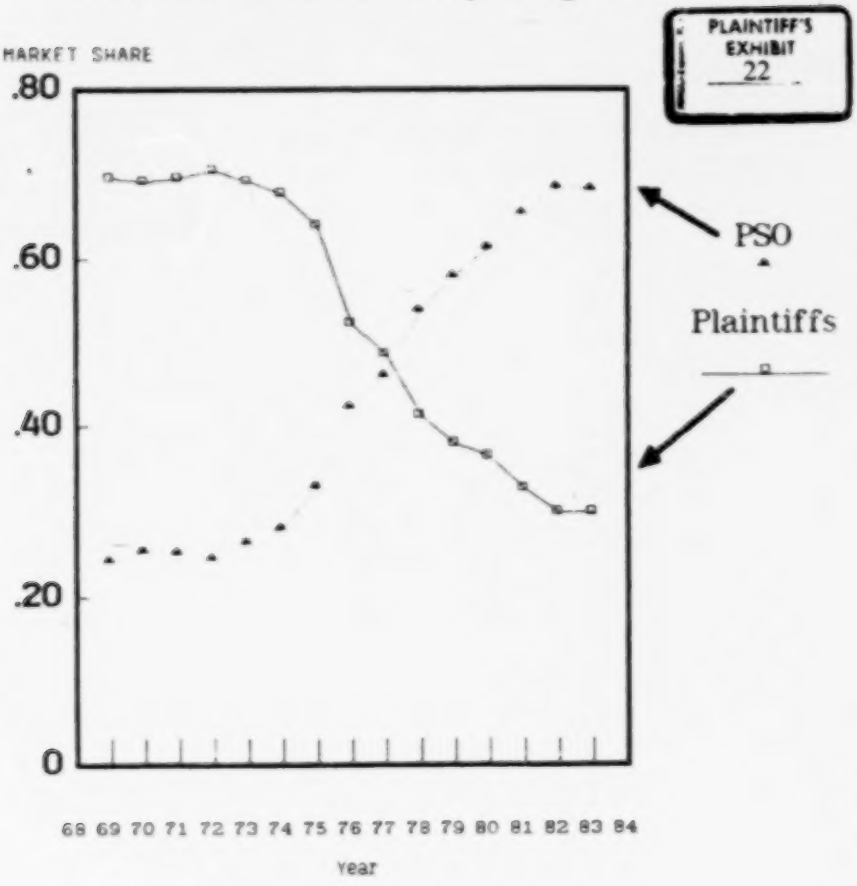
Tuesday, October 2, 1984

The clerk is directed to issue the following orders:

55,320 (consolidated with 55,346 and 55,354) Public Service Company of Oklahoma v. The State of Oklahoma. Rehearing as to Part VI of the majority opinion denied.
CONCUR: Simms, V.C.J., Hodges, Doolin, Hargrave, Kauger, JJ.
DISSENT: Barnes, C.J., Lavender, Opala, JJ.

MARKET SHARES-METRO TULSA

175w/400w/sodium vapor lights



Market Shares-Metro Tulsa
175w/400w/sodium vapor
Commercial & industrial

	LL	PR	KN	SE	PSO	
69	0.2372	0.1336	0.2321	0.0925	0.2423	
70	0.2028	0.1689	0.2062	0.1132	0.2523	
71	0.1912	0.1620	0.2014	0.1405	0.2501	
72	0.2015	0.1616	0.1869	0.1555	0.2428	
73	0.1953	0.1482	0.1739	0.1717	0.2620	
74	0.1987	0.1358	0.1683	0.1731	0.2780	
75	0.1973	0.1323	0.1447	0.1631	0.3276	.25458031365-avg.69-74
76	0.1754	0.1047	0.1118	0.1295	0.4207	
77	0.1658	0.0945	0.0984	0.1266	0.4584	
78	0.1441	0.0773	0.0828	0.1111	0.5351	
79	0.1384	0.0732	0.0789	0.1019	0.5645	
80	0.1326	0.0747	0.0763	0.0999	0.5949	
81	0.1412	0.0631	0.0674	0.0903	0.6182	
82	0.1344	0.0541	0.0614	0.0824	0.6491	
83	0.1348	0.0514	0.0623	0.0806	0.6493	